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No. 77-1787

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

ANTHONY J. GIACALONE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

Joseph F. Dillon,
Counsel for the Petitioner
Raymond, Fletcher, Dillon &
Titcomb, P.C.
400 Renaissance Center,
Suite 2370
Detroit, Michigan 48243

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STATEMENT OF THE CASE

In an attempt to convince this Court that it was permissible for the government to treat the expenditures of Mrs. Giacalone as having been made with her husband's money, the government attempted to create the impression that Mrs. Giacalone did not have any income. They did so when they noted that the government had examined the Social Security Administration records of Mrs. Giacalone, and that the records "...revealed that petitioner's wife had no income during that period." (Br. 3)

The statement is misleading since only "wages" as defined in 42 U.S.C. §409, are reported to the Administration. Accordingly, their records would not reflect passive forms of income such as rent, interest, dividends, capital gains, gifts and inheritances. In fact, rental income was reported by Mrs. Giacalone on the separate returns which she filed for the years 1953 through 1960. Exhibits 6; 9; 13; 17; 21; 25; 29, and 34. Moreover, during the trial, the government's summary witness, as well as government counsel admitted and proclaimed repeatedly that Mrs. Giacalone did have her own net worth and expenditures and that they were being included in the joint net worth computation of her and her husband. (Pet. 6-7)

The government also argued that its cash analysis showed that the petitioner could not have accumulated any hidden cash reserve from known sources of income prior to the prosecution years. The cash analysis did no such thing. In fact, the cash analysis should never have been received into evidence in the first instance, since it was flawed. (Pet. 11 n. 3) Moreover, the only thing the cash analysis did was demonstrate that there had to be an explanation for the "excess expenditures". (Pet. 11-13)

ARGUMENT

ISSUE I

In this case, the government's summary witness defined the "dash" which he used for "cash on hand" in each of the four critical net worth computations as an "unknown". (R. 9987). [1] Nevertheless,

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[1] "R" refers to the record of the case. "A" refers to the joint appendix filed with the circuit court.

the government argues (Br. 4) that it is proper to do so. The issue is quite frustrating since the government is actually arguing that it can assume, as opposed to prove, the most difficult point in a net worth case, that is, cash on hand. It is an incredible "boot-strap" argument.

The government also argued that the petitioner's cash position remained relatively uniform during the prosecution years. Its basis for that argument is a statement volunteered by its summary witness. He testified, "... a dash doesn't mean zero. A dash means that the cash position has been determined to be uniform." (R. 9666, or A. 1060 of the joint appendix cited by the government.) Next followed statements to the effect that he had concluded that the petitioner had cash on hand. The same testimony is repeated three pages later. (R. 9669, A. 1063) Such statements can hardly support the assertion that the amount of cash on hand remained constant.

Moreover, no evidence was introduced by the government that the amount of cash remained uniform throughout the prosecution period. Since the government had the burden of establishing the opening net worth for each of the prosecution years, and since there was no evidence introduced by the government with respect to cash on hand after the first prosecution year, there had to have been a failure of burden of proof for the last three prosecution years.

Therefore, since there was no evidence pertaining to cash on hand for the last three years and since the employed "dash" is an unknown, as a matter of law the government failed, on that dual basis, to sustain its burden of proof with respect to the last three prosecution years. In connection with the first year,

the government relied upon its flawed cash analysis to "prove" that there could not have been a significant amount of cash on hand. Since the cash analysis was incompetent for that purpose, and since an unknown (the "dash") was used in the first year's computation the government failed to sustain its burden with respect to that year as well.

Not only would the adoption of the government's position in this case negate the necessity of proving the actual amount of cash on hand for the opening net worth, but it also places a defendant in an impossible situation. How does he attack the prosecution's case on the most vital asset when it is represented by a "dash". Upon a defendant offering evidence of cash on hand, the government could defend its case by simply saying - we have given credit for that by using a dash.

On the other hand, if for example the prosecution in this case had taken the position that, in connection with the opening net worth, there was five thousand dollars ($5,000.00) in cash on hand on January 1, 1968, it would have been faced with the task of explaining how that could be the case when only sixteen (16) days later the defendant purchased two certified checks totaling twenty thousand dollars ($20,000.00).[2] Exhibit D-21, R. 3105-08, and

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[2] It was established by the defense that the original certified checks were given to the government. R. 3108 and R. 3115-3116. If the government had offered them into evidence, they could have been picked up as additional non-deductible living expenses thereby resulting in an increase in the computed understatement of income for 1968 by $20,000. By not using them, the government avoided the necessity of explaining the suggested inconsistency.

R. 3115-3116. An inability to render such an explanation could well have led to the conclusion that the opening net worth had not been established with reasonable certainty. Accordingly a dismissal would have followed.

In light of the total lack of an evidentiary basis for its "uniformity" statement, the cases cited by the government are not relevant. As noted, in the case of United States v. Carter, 462 F. 2d 1252 (6th Cir. 1972), cert. denied, 409 U.S. 984 (1972) the government used a figure, and therefore the case is not applicable. In fact, the only thing the Carter case does is highlight the lack of a basis for the government's case in this matter. The second case cited by the government, United States v. Bush, 512 F. 2d 771 (5th Cir. 1975), also undermines the government's argument. There, cash on hand was treated as a zero constant because, as the appellate court pointed out, there was evidence to support the government's use of zero for cash on hand.

The government next argues (Br. 5) that cash on hand can be a jury question. However, as developed in the petition (Pet. 13-14), this is not a "sufficiency case", per se. Here, due to the use of an unknown, the jury was precluded from making any determination as to whether there were any understatements of tax. For that reason, the cited cases of United States v. Mackey, 345 F. 2d 499 (7th Cir. 1965), cert. denied, 382 U.S. 824 (1965) and Fowler v. United States, 352 F. 2d 100 (8th Cir. 1965), cert. denied, 383 U.S. 907 (1966) are not on point.

On the other hand, the Mackey case points to another error that occurred in this case. There,

the government did not include any amount for cash on hand because the investigation had not revealed any cash on hand at any time, and if a figure of cash had been included at the starting point, such figure would have been truly arbitrary. In contrast, in this case, the summary witness testified that Mr. Giacalone did have cash on hand. Nevertheless, the summary agent did not use a figure for it. This latitude taken by the summary witness is impermissible and in fact constitutes reversible error. (Pet. 9 n. 1)

The government next argued (Br. 5) that the court of appeals accepted the testimony of the government's expert summary witness that "[a] dash means that the cash position has been determined to be uniform". We agree that the circuit court accepted that testimony. (Pet. App. 24) However, as previously demonstrated, the testimony was totally unsupported by any evidence of record. In fact, there is no evidence to the effect that the cash position remained constant throughout the prosecution period. The government's failure to cite any such evidence proves the point. Accordingly, the circuit court's error is clear.[3]

In making its argument that the summary witness was only explaining his analysis of evidence (Br. 6 n. 4) the government quoted the case of United States v. Callanan, 450 F. 2d 145, 149 (4th Cir.

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[3] The government also erroneously declared (Br. 5 n. 3) that the petitioner equates the dash to zero. In fact, the petitioner notes that the government summary witness defined the dash as an "unknown" and for purposes of demonstrating that the government did not sustain its burden of proof, the petitioner accepts that definition.

1971). However, the only thing that case actually does is to point out that it is not permissible to base conclusions on assumptions. However, this is precisely what happened in this case. The government also cited the case of Friedberg v. United States, 348 U.S. 142 (1954). However, in the Friedberg case, the summary witness had not included any amount of cash on hand because he had found no evidence of such cash. In comparison, in this case the summary witness declared that there was evidence that Mr. Giacalone had cash on hand, but nevertheless no amount was used. Since according to the summary witness himself there was evidence of record of cash on hand, and since no amount for such was reflected by the summary witness on his chart, reversible error occurred. See: United States v. Morse, 491 F. 2d 149 (1st Cir. 1974), and United States v. Altruda, 224 F. 2d 935 (2nd Cir. 1955).

The government next (Br. 6) returned to its argument that the matter of "cash on hand" was a jury question. On doing so, they made a series of misstatements. For example, the government argued that the petitioner had received his cash hoard of $300,000.00 from his father. The government asserts that the petitioner's sister and son testified to that effect. The statement is an overstatement. At the time the father transferred some cash to his son, the petitioner's sister was witness to the transfer, but was unable to testify as to the amount. (R. 11,963-11,964)

No one ever testified that the petitioner's cash hoard was solely attributable to the cash received from his father. The government would have this Court believe such was the case since they were able to introduce evidence that the petitioner's father

had experienced some financial difficulties. However, that statement is again misleading since the transfer occurred in 1960, whereas the petitioner's father's financial difficulties occurred in 1938, and earlier years. It is unknown how much of the father's cash was accumulated after 1938 to 1960, and particularly during the years 1943 to 1948 when the petitioner's father owned a bar and bowling alleys. (R. 11, 942) Accordingly, the financial difficulties that the petitioner's father experienced were well behind him before the 1960 transfer.

The government next erroneously asserted that there was testimony to the effect that the alleged hiding place of the petitioner's cash hoard did not exist at the time claimed. The testimony alluded to was that of Mr. Archie Damman, Jr. However, during cross examination, his ignorance of the home construction was established to have been so complete that when the secret room was publicized during the trial, he went to his father, who was the contractor for the construction of the Giacalone home, and asked him if he had built the secret room.[4] (R. 13, 805) He asked his father because the father was the "boss" and "he could have put it in without his knowing about it." (R. 13, 805)

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(4) As Mrs. Eastman testified, in the closet of one bedroom there was a removable board which was held in place by magnetic catches. A. 2201, 2107-2109. By removing the board, two chains and a slide bolt were exposed. A. 1119-1120, A. 2107-2109. By pulling the chains, the bolts on the staircase were removed enabling one to lift a portion of the staircase leading to the third floor of the house. A. 1121-1122, A. 2109. The closet and the staircase were in separate rooms. A. 2106. Once the portion of the staircase was lifted, the safe was visible. A. 2109, A. 1122-1126.

The government also erroneously alleged that the Michigan Intangible Tax returns were of some value in establishing that there was no cash on hand. In fact, the accountant testified that it was the policy of his office not to ask clients whether they had cash on hand. Accordingly, on all of the returns which the accounting company prepared, the space provided for an answer with respect to cash on hand was left blank. (R. 481) The point is that the information for the Michigan Intangible Tax returns came from the federal tax returns prepared by the accounting firm. (R. 481) Since there is no question on the federal tax return pertaining to cash on hand, the reason for the failure to make a notation on the Michigan Intangible Tax return with respect to cash on hand is obvious.

The government next argued (Pet. 7 n. 5) that it may reconstruct a taxpayer's income for prior years in net worth cases, and then erroneously argued that such reconstruction can cover computations of understatements of taxable income for pre-indictment years. If such a proposition were true, such an individual would be on trial for the pre-indictment years as well. The two cases cited by the government do not support their position.(5) It is also interesting to note that the government failed to address itself to the case, United States v. Logan, 414 F. 2d 230 (6thCir. 1969), (Pet. 12) which stands for the proposition that the general receipt into evidence of a revenue agent's computation of an understatement for a period including non-indictment years is reversible error.

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(5) In fact, in the case of Vloutis v. United States, 219 F. 2d 782 (5th Cir. 1955), the taxpayer's conviction was reversed.

In departing from its main theme, in the same footnote, the government switches and says a "zero" and a "dash" are one and the same. It did so when it argued that there was no error when government counsel asked, over objection, the defense summary witness to use a zero for cash on hand. It is difficult to appreciate the government's position since they are the ones who have argued so vigorously that the dash does not mean zero. Since both sides were most adament that there was some cash on hand, it was, in fact, reversible error for theprosecuting attorney to have the defendant's summary witness assume a fact not in evidence, that is, the defendant had no cash on hand. (Pet. 14)

The government next argued (Br. 7 n.6) that it is for the jury to decide whether there was enough cash to account for the increases in the taxpayer's net worth. The petitioner agrees. However, in this case the jury was told by the government that there was an indefinite amount of cash on hand. Rejecting the defense completely, how could thejury have concluded that the petitioner understated his income, when computations were impossible with respect to the government's net worth computation, since it contained an unknown in each year. (R. 13,462-13,463 or A. 1386-1387)

With a zero balance for cash on hand, a jury can make a computation; with an unknown it cannot. This is the difference. In this case, the government refused to take a definitive position regarding the amount of cash on hand. It is for that reason that the case of United States v. Goichman, 407 F.Supp. 980 (E.D. Pa. 1976), aff'd. 547 F.2d 778 (3rd Cir. 1976), where a zero was used, is of no assistance to the government.

In attempting to explain away the case of Taglianetti v. United States, 398 F. 2d 558, 565 (1st Cir. 1968), aff'd. 394 U.S. 316 (1969), the government apparently was in confusion as to what the court was addressing itself to, when it said an exact dollar value did not have to be determined for each of the assets comprising the taxpayer's opening net worth. The court was addressing itself to a cash expenditures case as opposed to a net worth case. In fact, the court said a net worth case dictates precise figures for the opening and closing net worth positions for each of the taxable years so as to have the basis for the critical subtraction.

The government next attempted (Br. 8 n. 7) to distinguish this case from the case of Phillip's Estate v. Comm., 246 F. 2d 209 (5th Cir. 1957). The government proclaims that there was much evidence on the cash on hand question. However, it fails to cite any such evidence which established that the amount of cash remained constant during the prosecution period. Failure to cite was predicated on the fact that there is no such evidence. In short, we have a "Phillip's Estate" situation.

The government concludes this argument with the statement that by its verdict the jury rejected the petitioner's claim of a cash hoard. However, it overlooks the fact that the petitioner was acquitted on the fourth count.

ISSUE II

In this section of their brief, the government starts out apparently arguing that a husband can be prosecuted for income tax evasion by his wife if a joint return is filed. The basis for the argument

is the contention that by filing a joint return, a husband and wife become a single entity for the purposes of federal income taxation. The case of Coerver v. Comm., 36 T.C. 252 (1961), aff'd. 297 F.2d 837 (3rd Cir. 1962), was cited as authority. In fact, the Coerver case stands for the proposition that when a husband and wife file a joint return, there are still two distinct and separate taxpayers. The individuality of the taxpayers is not, in fact, lost by the filing of a joint return. Marie A. Dolan, 44 T.C. 420, 427-428 (1965).

The nature of the involved returns is in reality of no consequence. The decisions above demonstrate the point. Moreover, it is the position of the Internal Revenue Service that the filing of a joint return does not have the effect of converting the income of one spouse into the other. Rev. Rul. 74-611, 1974-2 C.B. 399, and the cases cited therein.

The government completes this argument by stating that the court of appeals was correct in concluding that the evidence was sufficient to permit the government to treat the expenditures by Mrs. Giacalone as having been made with her husband's money The point is, of course, that the government did not treat Mrs. Giacalone's expenditures as having been made with her husband's money. Throughout the trial, it was the government's position that a joint net worth and expenditures computation was permissible. Therefore, no attempt whatsoever was made to trace Mrs. Giacalone's expenditures to her husband's funds.

The failure to do so was fatal to the government's case since not only the defense, but the government as well, established that Mrs. Giacalone had her own assets and income. The proof was so

sufficient as to prompt the trial court to declare that there was no question that the net worth computation of the government was a joint net worth computation. (Pet. 7, and 15-16) Also, the circuit court was in error when it substituted its judgment for the judgment of the trial court with respect to the matter of whether Mrs. Giacalone had an independent net worth. Moreover, the circuit court's judgment was in contradiction to the evidence of record produced by both sides on the matter.

The government erroneously cited the case of United States v. Costello, 221 F.2d 668, 674 (2nd Cir. 1955), aff'd. 350 U.S. 359 (1956), as support for its argument. In fact, it defeats it. In that case, Judge Learned Hand declared that it was permissible for the government to investigate the wife's financial sources so as to refute the defendant's claim that some of the expenditures were attributable to his wife's funds. The court continued by saying this may be done by analyzing her finances in the pre-indictment period. The court commented that the investigation may then be used to inferentially establish that during the indictment years, she had no wealth. In light of those circumstances, which were present in the Costello case, but which are not present here, her expenditures were properly attributable to her husband's income.

By applying the court's reasoning in the Costello case to the present case, the expenditures of Mrs. Anthony J. Giacalone cannot automatically and mechanically be attributed to the petitioner, her husband. The burden was on the government to segregate the assets of Mr. and Mrs. Giacalone, and to trace the expenditures from each respective source so that only those expenditures out of

Mr. Giacalone's funds would be "charged" against him. The circuit court is also of the opinion that this is the government's burden. (Pet. App. 26-27) Having refused to do so, and on the basis of the Costello case, as a matter of law, the government failed to sustain its burden of proof.[6]

CONCLUSION

After reviewing the petition and briefs, it becomes apparent that the review of this case by the Supreme Court will serve a multiple of purposes. First, it will eliminate this dangerous precedent which is in conflict with the case of Holland v. United States, 348 U.S. 121 (1954), as to the government's burden in a criminal net worth fraud case.

Second, it will eliminate the conflict which now exists between the Sixth and the First and Fifth Circuits with respect to what is required in establishing the opening net worth of a criminal tax fraud case. Third, a review will also eliminate the conflict which now exists between the Sixth and the Ninth Circuits, with respect to the propriety of the substitution of the circuit court's judgment for that of the trial court. In this case, it occurred in connection with the matter pertaining to the petitioner's wife having an independent net worth of her own.

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[6] It is not contested that a "joint" net worth analysis can be used in the prosecution of a husband alone where the evidence shows that the wife did not have an independent net worth and a source of funds for her expenditures. In fact, in such a case it is not a "joint net worth analysis" in the first instance. Rather, it is simply an analysis of the husband's net worth and expenditures.

Fourth, it will give this Court an opportunity to delineate and prescribe the scope of a summary witness's testimony. Fifth, it will re-establish the net worth method of proving tax fraud as a viable tool for the prosecution and at the same time enable an accused to defend himself by condemning the use of "dashes", whether there be one or more used in a given case. Finally, a review will prevent the net worth method from becoming an elaborate accounting "sham" which was once the fear of this Court, and which it is in this case.

For those reasons, the petition for writ of certiorari should be granted.

JOSEPH F. DILLON
Counsel for the Petitioner
Raymond, Fletcher, Dillon & Titcomb, P.C.
400 Renaissance Center,
Suite 2370
Detroit, Michigan 48243